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No. 89-189

In The

Supreme Court of the United States

October Term, 1989

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent, Arizona State Prison,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Where a federal court has determined that a state court has adopted a constitutionally narrow definition of an aggravating circumstance in a capital case, may the federal court make a de novo review of the evidence supporting the state court's finding of that aggravating circumstance?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 832 F.2d 476 (1987).

The opinion of the United States District Court for the District of Arizona is reported at 627 F. Supp. 1334 (1986).

The opinion of the Supreme Court of Arizona affirming respondent's convictions and sentences is reported at 135 Ariz. 404, 661 P.2d 1105 (1983).

JURISDICTION

This Court granted petitioners' petition for writ of certiorari on October 10, 1989, to review the judgment of the United States Court of Appeals for the Ninth Circuit. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The pertinent part of the Fourteenth Amendment to the Constitution of the United States provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

In August of 1976, respondent was incarcerated in the Pima County jail.[1] While there, he obtained a copy of a police report which stated that his girlfriend, Penelope Cheney, had given information to the police about respondent and his narcotics-related activities. Respondent wrote a note to another jail inmate offering him money if he would kill Cheney. Respondent asked a detention officer to deliver the note, but the officer read the note and turned it over to his supervisor.

On October 8, 1976, respondent was released from jail on bond. Shortly afterwards, he met Doris Van Der Veer at a party and began living with her at a Tucson motel. Respondent had Van Der Veer deliver a note to Cheney, inviting her to the motel.

On October 20, 1976, respondent told Van Der Veer that Cheney was coming over and asked her to leave during Cheney's visit. As Van Der Veer left the motel room, Cheney arrived and respondent introduced the two women. Respondent and Cheney then went inside the motel room.

Van Der Veer waited around the motel grounds for about 2 hours. She then went back to the motel room and knocked on the door. Respondent answered, pointed a gun at Van Der Veer, and told her to sit down and be quiet. Cheney, who appeared to be unconscious, was lying on her back on the bed.

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[1] All facts are taken from the decision of the Arizona Supreme Court. (Joint Appendix at 17-20, 59-63.)

Respondent then injected a fluid into Cheney's hand and said, "I have given her enough shit to kill a horse and this bitch won't die." Van Der Veer, a former nurse, noticed foam coming from Cheney's mouth (a sign of a drug overdose). After checking Cheney's condition and determining that she was still alive, Van Der Veer asked respondent if he was going to help Cheney. He responded, "No, I am going to kill her."

Respondent took Cheney's belt off, straddled her, and began to choke her with it. When Cheney continued to breathe, respondent discarded the belt and began choking her with his hands. Van Der Veer told respondent to stop because Cheney was going to die anyway, but respondent said, "No, I've seen her this way before and she's come out of it." Respondent continued choking Cheney and then told Van Der Veer to check Cheney's pulse. Van Der Veer could not find a pulse and told respondent that Cheney was dead.

Respondent prepared another syringe of heroin and had Van Der Veer inject it into Cheney's groin and hand. He also told her to get on top of Cheney and choke her. Respondent took photographs of Van Der Veer as she complied with his orders, telling her that he now had proof that Van Der Veer was an accomplice.

Apparently still not satisfied, respondent climbed back on top of Cheney and began beating her in the face with his hands. Respondent called Cheney a "bitch" and a "dirty snitch" and, as each blow landed, said, "This one is for [naming several names]." He finally dragged Cheney's body to the bathroom and put it in the shower stall.

After 3 days in the shower stall, the body began to smell. Respondent and Van Der Veer wrapped the body in newspapers and garbage bags and put it in a sleeping bag. They then drove the body to the Sedona area and buried it in a shallow grave.

The state later charged respondent with the first-degree murder of Cheney and with aggravated assault on Van Der Veer. On February 9, 1978, a jury found him guilty of both charges. Following an aggravation-mitigation hearing, the trial court sentenced respondent to death for the murder and to a prison term of not less than 5 years nor more than 10 years for the assault. (Joint Appendix at 9-10.)

While respondent's direct appeal was pending, the Supreme Court of Arizona ordered him resentenced pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978). After another aggravation-mitigation hearing, the trial court again sentenced respondent to death. The death sentence was based on two aggravating circumstances: that respondent created a grave risk of death to Van Der Veer, and that he committed the murder in an especially heinous, cruel and depraved manner. (Joint Appendix at 12-14.) The case then returned to the Arizona Supreme Court, which affirmed the convictions and sentences. *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105, *cert. denied*, 464 U.S. 865 (1983). In affirming the death sentence, the supreme court overturned the trial court's "grave risk of death" finding and its finding that the murder was "especially cruel." It affirmed the finding that the murder was "especially heinous and depraved." (Joint Appendix at 58-63.)

On December 2, 1983, respondent filed a petition for writ of habeas corpus in the United States District Court. On February 4, 1986, the district court denied relief. *Jeffers v. Ricketts*, 627 F. Supp. 1334 (D. Ariz. 1986).

Respondent then appealed to the Ninth Circuit. On November 9, 1987, a three-member panel of the Ninth Circuit rejected respondent's attacks on his convictions. Two members of the panel, however, vacated respondent's death sentence on the ground that the "especially heinous or depraved" aggravating circumstance was incorrectly applied to respondent. The two-member majority found that Arizona had adopted an adequate narrowing construction of the circumstance, but held that the construction could not be applied to respondent "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." *Jeffers v. Ricketts*, 832 F.2d 476, 486 (9th Cir. 1987). On April 14, 1989, the Ninth Circuit denied petitioners' motion for rehearing and suggestion for rehearing en banc.

Petitioners filed their petition for writ of certiorari on July 13, 1989. On October 10, 1989, this Court granted the petition.

SUMMARY OF ARGUMENT

In setting aside respondent's death sentence, the Ninth Circuit improperly substituted its judgment for that of the Arizona Supreme Court. Once the Ninth Circuit had determined that Arizona had adopted an adequate narrowing construction of the "especially heinous

or depraved" aggravating circumstance, it should have gone no further. Assuming that the Ninth Circuit did have authority to determine whether the evidence supported the finding of that circumstance, its review of the finding should have been deferential and limited, rather than complete and independent.

Even if the Ninth Circuit's standard of review was proper, its analysis was faulty. Its review of selected Arizona cases does not demonstrate any error in the finding that respondent's conduct was "especially heinous and depraved."

ARGUMENT

THE NINTH CIRCUIT ERRONEOUSLY SET ASIDE RESPONDENT'S DEATH SENTENCE BASED ON ITS FINDING THAT THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS AND DEPRAVED."

A. The Ninth Circuit Applied an Incorrect Standard of Review in Determining that the "Especially Heinous and Depraved" Aggravating Circumstances Could Not Be Constitutionally Applied in this Case.

In his federal habeas corpus petition, respondent argued that Arizona's "especially heinous, cruel or depraved" aggravating circumstance was unconstitutionally vague on its face. The Ninth Circuit rejected this argument, relying on an earlier decision in *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987). The federal court concluded that the Arizona

Supreme Court had narrowly construed the meaning of this circumstance, thereby limiting sentencing discretion so as to prevent arbitrary and capricious capital sentencing decisions.[2] *Jeffers v. Ricketts*, 832 F.2d at 482. Since respondent did not file a cross-petition for writ of certiorari, that issue is not before this Court in this case.[3]

Respondent also argued that the "especially heinous, cruel or depraved" circumstance was unconstitutionally vague as applied to him. Here, two members of the three-member Ninth Circuit panel agreed with respondent. The majority reviewed a few reported Arizona cases, compared them with respondent's case, and concluded that Arizona's narrow construction of the circumstance could not be applied to respondent "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." 832 F.2d at 486. Although the majority allowed that respondent's murder of Penelope Cheney "certainly qualifie[d]" as a "grisly affair," it found the murder insufficiently "shocking" to meet Arizona's standard for this aggravating circumstance. 832 F.2d at 484.

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[2] Seven members of the Ninth Circuit's limited en banc court of 11 judges reached the opposite conclusion several months later in *Adamson v. Ricketts*, 865 F.2d 1011, 1031-39 (9th Cir. 1988). The state's certiorari petition from the *Adamson* decision is pending before this Court. *Ricketts v. Adamson*, No. 88-1553.

[3] On October 2, 1989, this Court granted certiorari in another Arizona case raising this same issue. *Walton v. Arizona*, No. 88-7351.

In essence, the Ninth Circuit simply substituted its judgment for that of the Arizona Supreme Court on whether the facts of this case were sufficient to establish the "especially heinous and depraved" circumstance. This is a significant step for a federal court to take in reviewing a state court's application of the state's own law. If the Ninth Circuit has the authority to make its own decision whether an aggravating circumstance is supported by the evidence, may it also find evidentiary support for a mitigating circumstance that the state court determined did not exist? May it also overturn a state court determination that a capital defendant's mitigating evidence was insufficient to call for leniency? Petitioners submit that these hypothetical decisions, like the decision in this case, exceed the bounds of the Ninth Circuit's authority to review state court decisions.

In general, federal review of state criminal convictions is limited and deferential. For example, federal courts reviewing a state prisoner's petition for writ of habeas corpus must give state court factual findings a presumption of correctness. *See* 28 U.S.C. § 2254(d). The Ninth Circuit's review of the state court finding that respondent's conduct was especially heinous and depraved was far from deferential and is inconsistent with principles of federalism and comity.

This Court has not exercised wide, intrusive powers of review in capital cases. Rather, the thrust of this Court's decisions has been to insure that sentencing discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious actions. *Barclay v. Florida*, 463 U.S. 939, 950 (1983). Where a state's

sentencing procedures focus discretion on the particularized nature of the crime and the particularized character of the defendant, this Court may lawfully presume that the defendant's death sentence was not wantonly and freakishly imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment. *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987). Justice White has described the limited review of federal courts:

> [O]ur role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of facts that quite reasonably – perhaps even quite plainly fit within the statutory language.

Godfrey v. Georgia, 446 U.S. 420, 450 (1980) (White, J., dissenting) (footnote omitted).

The Eleventh Circuit has recognized similar limits to its reviewing authority. In rejecting a death row inmate's claim that the Florida Supreme Court had violated the Eighth Amendment by failing to apply in his case the same standard of review applied in other cases, the Eleventh Circuit said:

> While petitioner characterizes this contention as the Florida Supreme Court's failure to apply a consistent standard of review in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the district court correctly discerned that he is simply 'quarreling' with the state court. Where in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S. Ct. at 2969, federal courts will not undertake a case-by-case comparison of

> the facts in a given case with the decisions of the state supreme court. *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir. 1978), *cert denied*, 440 U.S. 976, 99 S. Ct. 1548, 59 L. Ed. 2d 796 (1979). This rule stands even though were we to retry the aggravating and mitigating circumstances in these cases, 'we may at times reach results different from those reached in the Florida state courts.' Id. at 605.

Ford v. Strickland, 696 F.2d 804, 819 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865 (1983). The Eleventh Circuit later modified its views on its power to review the evidence supporting aggravating and mitigating circumstances, but still maintained a deferential review by applying the presumption of correctness under 28 U.S.C. § 2254(d). *Magwood v. Smith*, 791 F.2d 1438, 1449 (11th Cir. 1986).

The Ninth Circuit's decision in this case is a clear break with this precedent. Although the majority relied heavily on *Godfrey* to support its decision to vacate respondent's death sentence, *Godfrey* does not authorize federal court review of the facts supporting an aggravating circumstance that is not impermissibly vague on its face. Godfrey's death sentence was based on a jury finding that his murders were "outrageously or wantonly vile, horrible and inhuman." Because the jury received no instructions on the meaning of the aggravating circumstance, and because the Georgia Supreme Court's appellate review of the jury's finding was limited to a statement that the finding was "factually substantiated," this Court reversed Godfrey's death sentence. It was the failure of the Georgia courts to narrowly define and apply the aggravating circumstance that required reversal, not this Court's conclusion that the facts did not

support the jury's finding. *Godfrey v. Georgia*, 446 U.S. at 435 n.1 (Marshall, J., concurring). Thus, *Godfrey* only authorizes the first conclusion reached by the Ninth Circuit regarding this aggravating circumstance: that the Arizona courts had narrowly construed the circumstance so as to prevent arbitrary and capricious actions.

Maynard v. Cartwright, 486 U.S. 356 (1988), also does not authorize the Ninth Circuit's action in this case. Cartwright's death sentence was based on a jury finding that his murder was "especially heinous, atrocious or cruel." Because the jury received no guidance on the meaning of the aggravating circumstance, its sentencing discretion was unfettered. That unfettered discretion was not cured by the Oklahoma Criminal Court of Appeals, which appeared merely to survey the facts to see whether the circumstance existed, without saying what factors had to be present to sustain it. Thus, as it did in *Godfrey*, this Court reversed Cartwright's death sentence.

In this case the Ninth Circuit acknowledged that the Arizona Supreme Court had narrowly defined and applied the "especially heinous, cruel or depraved" aggravating circumstance. This decision, which respondent has not asked this Court to review, is authorized by *Godfrey* and *Wainwright*. The Ninth Circuit's decision to go farther and review the state court's factual findings and its application of the circumstance to respondent exceeds the scope of federal review. Arizona's narrow construction of the circumstance and its numerous procedural protections (sentencing by a judge rather than a jury, proof of aggravation beyond a reasonable doubt, written findings by the sentencing judge, automatic and independent review by the state supreme court, etc.)

allow this Court to lawfully presume that respondent's death sentence was not wantonly and freakishly imposed. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The Arizona Supreme Court carefully reviewed the applicable case law and the evidence in respondent's case. Its review led it to set aside the trial court's finding that the murder was committed in an especially cruel manner. *State v. Jeffers*, 135 Ariz. at 429, 661 P.2d at 1130. It also concluded that the murder was committed in an especially heinous and depraved manner. This Court's mandate does not extend to interfering with fact-finders in state criminal proceedings or with state courts that are responsibly and consistently interpreting state law, unless that interference is predicated on a violation of the Constitution. *Godfrey v. Georgia*, 446 U.S. at 451 (White, J., dissenting). Because the Ninth Circuit had determined that Arizona's definition of the aggravating circumstance was sufficiently narrow, there was no federal constitutional predicate on which to overturn the state court's conclusion that the murder was especially heinous and depraved. Under these circumstances, Arizona's application of its own law is not subject to federal review.

But even if federal review is permissible, it is certainly not as extensive as that employed by the Ninth Circuit. A plurality of this Court has stated that its review of the evidence supporting state court findings of aggravating circumstances is limited to determining whether the findings are so unprincipled or arbitrary as to somehow violate the Constitution. *Barclay v. Florida*, 463 U.S. at 947. As discussed above, the Arizona Supreme Court's analysis of the case law and the evidence was careful and thorough, and included a reversal of a portion of the trial

court's finding. Under these circumstances, the finding that the murder of Penelope Cheney was especially heinous and depraved was neither unprincipled nor arbitrary, and did not violate the Constitution.

The dissenting member of the Ninth Circuit panel applied another possible standard of review: whether any rational fact-finder could have found the existence of the aggravating circumstance. This "rational factfinder" standard is taken from that used in *Jackson v. Virginia*, 443 U.S. 307 (1979), for federal habeas review of a state prisoner's claim that the evidence did not support his conviction. This Court does not equate the finding of an aggravating circumstance with a jury finding of guilt. See *Hildwin v. Florida*, ___ U.S. ___, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1988) (existence of an aggravating factor is not an element of the offense and need not be found by a jury); *Poland v. Arizona*, 476 U.S. 147 (1986) (failure to find any aggravating circumstance is not an "acquittal" of that circumstance for double jeopardy purposes). Nevertheless, a "rational factfinder" standard would accord deference to the state court finding, which the Ninth Circuit failed to do.

The Constitution does not authorize federal courts to make their own assessments of the evidence supporting a state court's finding of an aggravating circumstance. The Ninth Circuit overstepped this boundary when it set aside respondent's death sentence. Therefore, this Court should reverse the Ninth Circuit and clearly enunciate the proper standard to be used by federal courts in reviewing a state court finding of an aggravating circumstance.

B. The Ninth Circuit Incorrectly Applied and Interpreted Arizona Law in Setting Aside Respondent's Death Sentence.

To support its conclusion that the "especially heinous and depraved" circumstance could not be applied to respondent, the Ninth Circuit reviewed only a few of the Arizona cases that discussed the circumstance. According to the Ninth Circuit, these cases demonstrated that respondent's conduct was neither especially heinous nor especially depraved.[4] A review of these cases, however, establishes the opposite conclusion.

In *State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (1983), the only evidence that Smith murdered in an especially heinous and depraved manner was the uncorroborated testimony of his accomplice that, after the victim's body had been buried, Smith had requested the playing of a tape of the song, "We Are the Champions." Evidence also showed that Smith later attempted suicide, partly out of remorse over the murder. The Arizona Supreme Court set aside the trial court's finding that the murder was especially heinous and depraved because of the "equivocal"

[4] In each capital case, the Arizona Supreme Court performs an independent review of the evidence supporting the trial court's findings on aggravating circumstances. *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *cert. denied*, 433 U.S. 915 (1977). It also compares the evidence in the case before it with the evidence present in previous capital cases it has considered. A basic problem with a federal court attempting to make this type of comparative review is that the federal court does not have before it the complete record of those other cases. Thus, it is not possible for a federal court to fully compare the evidence supporting the aggravating factor found in respondent's case with the evidence in other cases.

nature of the evidence: Smith had denied requesting the playing of the tape and the only evidence that he had done so came from his accomplice.

In contrast, the evidence establishing respondent's heinous and depraved attitude dealt with his conduct during or immediately after the killing. The evidence also did not come from an accomplice, as did the evidence in *Smith*. Doris Van Der Veer was the victim of the assault with a deadly weapon charge in this case, and respondent forced her to become involved in Cheney's murder. The trial court found that Van Der Veer was not an accomplice. (Joint Appendix at 8.) Finally, respondent, unlike Smith, expressed no remorse over the murder.

The next case the Ninth Circuit reviewed was *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983). Graham, who suffered from organic brain damage and was extremely immature and easily influenced by others, killed a man by shooting him twice. After the murder, Graham smiled while telling friends that the victim "squealed like a rabbit" when he was shot. The Arizona Supreme Court concluded that Graham's statement about the killing was more likely attributable to his immaturity, nervousness and need to impress his peers than to a hardened attitude towards the death of another.

Respondent was not immature or easily influenced by others and did not suffer from organic brain damage. His comments were made while straddling and repeatedly striking his dying victim. His words and conduct, unlike Graham's, plainly showed an especially heinous or depraved state of mind.

State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), involved a murder that occurred during a drug ripoff. Brookover shot his victim once in the back. As the victim lay on the floor moaning, Brookover said, "Don't worry * * * it will be over soon" and shot him again in the back. The Arizona Supreme Court concluded that the murder was not especially heinous or depraved.

Penelope Cheney, unlike Brookover's victim, did not suffer a relatively quick death. Respondent, unlike Brookover, climbed atop his victim and debased her by striking and cursing her. Respondent killed his victim because she had "snitched" on him and his words and conduct show that he relished the killing.

In *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), the defendant murdered two people in order to steal a large amount of marijuana from them. Ceja shot the first victim seven times, four times in the head at close range. He shot the second victim four times, twice at extremely close range, and then kicked him in the face. The Arizona Supreme Court concluded that the murders were especially heinous and depraved.

If anything, respondent's conduct was more reprehensible than Ceja's. Respondent overdosed his victim with heroin, strangled her with a belt and with his hands, and then climbed on top of her to beat and curse her. Respondent was certainly as determined to kill as Ceja, and surpassed Ceja in personally debasing his victim.

The Ninth Circuit also reviewed *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978). Watson and Reid burglarized a home. While Watson was upstairs, the homeowner began shooting at Reid. Watson came back

downstairs and shot the victim in the back four times, the last time while the victim was face down on the floor. The Arizona Supreme Court concluded that this killing was not especially heinous or depraved.

Penelope Cheney, unlike Watson's victim, did not initiate violence that led to her death. Watson, unlike respondent, did not debase his victim by striking and cursing him. Watson, unlike respondent, had no firm intent to kill anyone and used deadly force only after the victim did.

In *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985), the defendants were convicted of the murder of two armored car guards. There was no direct evidence regarding the circumstances surrounding the deaths. It was this lack of evidence that led the Arizona Supreme Court to conclude that the state had failed to prove that the murders were heinous or depraved.

There is no lack of evidence regarding the circumstances of Penelope Cheney's death and respondent's role in it. His words and actions plainly establish the heinousness and depravity of this murder.

The cases the Ninth Circuit reviewed fail to establish any reason why the especially heinous and depraved aggravating circumstance cannot be constitutionally applied to respondent. The evidence, which respondent does not challenge, shows that he formed his intent to kill Penelope Cheney far in advance of the actual murder. He then lured her to his motel room and gave her an overdose of heroin that rendered her helpless. When this failed to kill Cheney, respondent embarked on a lengthy series of acts designed to finish the job. Respondent did

not stop once Van Der Veer told him that Cheney was dead. He forced van Der Veer to participate and then further degraded the victim by cursing and beating her. Even under the standard of review employed by the Ninth Circuit, this evidence shows that respondent committed the murder in an especially heinous and depraved manner. The Ninth Circuit erred in holding that the Constitution required setting aside respondent's death sentence.

CONCLUSION

Once the Ninth Circuit determined that Arizona's "especially heinous, cruel or depraved" aggravating circumstance was not impermissibly overbroad on its face, it should not have reviewed the evidence supporting the finding of that circumstance. Even if such review is permitted, the Ninth Circuit's review was not deferential to the state court finding. The Ninth Circuit simply substituted its judgment for that of the Arizona Supreme Court. Finally, even under the standard employed by the Ninth Circuit, the Constitution does not require setting aside respondent's death sentence. Therefore, petitioners ask this Court to reverse that portion of the Ninth Circuit's decision and reinstate respondent's death sentence.

Respectfully submitted,

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